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No. 99-1085

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States

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ALAN B. LEVAN AND BANKATLANTIC FINANCIAL CORPORATION,
*Petitioners,*

v.

CAPITAL CITIES/ABC, INC. AND WILLIAM H. WILLSON,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## REPLY BRIEF OF PETITIONERS

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ABC's Brief in Opposition fails to engage the central points made in the Petition. On the first question, ABC does not (because it cannot) dispute that the Eleventh Circuit made its own, *de novo* determination of the broadcast's "gist," a preliminary factual issue that the parties vigorously contested at trial and that the jury resolved in petitioners' favor; that the court's determination of the gist was outcome-determinative; that petitioners' version of the gist was reasonable; and (as even the Eleventh Circuit recognized) that actual malice would have been established if the court had accepted petitioners' view of the gist. Nor does ABC deny that Mr. Stossel had intended the broadcast to convey this gist, and that the magistrate, the district court, and even ABC's own lawyers before trial had accepted this gist. And ABC devotes only one page and a single footnote of its 29-page brief to a discussion of the circuit split concerning the extent to which an appellate court may re-examine a jury's determination of gist and falsity. As if to highlight the almost unlimited breadth of the re-examination it believes appropriate, ABC devotes much of the balance of its brief to rehearsing its own version of preliminary facts—a version that the jury rejected when it returned its verdict in petitioners' favor.[1]

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[1] Moreover, ABC's recitation of the facts is misleading and irrelevant in many respects. For example, its lengthy recapitulation of the *Purcell* litigation is contrary to the findings of both the *Purcell* court and the *Levan* court. *See* Pet. App. 60a-61a, 67a. *Purcell* was decided a year *after* the broadcast, and therefore was irrelevant to ABC's state of mind and the issue of actual malice. Moreover, as the *Levan* magistrate noted: "[T]he record in *Purcell* indicates that vacatur was based on more than a wealthy litigant's buy out of an unfavorable judgment. Rather, the *Purcell* final judgment included specific findings in which the court expressed its belief that the judgment had weak underpinnings, was likely to be overturned on appeal, and noted the possibility of jury bias. These findings were consistent with the court's commentary throughout

As for the second question presented, ABC does not (because it cannot) suggest that the Eleventh Circuit made any attempt—as required by *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989)—to identify preliminary facts that the jury "must have found." ABC instead argues that there were no preliminary facts to identify, and that the Eleventh Circuit was therefore free to ignore *Connaughton*. In fact, after weighing the purported "mountain" of evidence that ABC believed the transactions to be unfair, the jury chose to believe instead the witnesses who testified that ABC *admitted* to them that its story was false. The Eleventh Circuit's failure to identify this evidence and to defer to the jury's findings is wholly inconsistent with *Connaughton*.

Finally, ABC does not (because it cannot) dispute the importance and the recurring nature of the questions presented, the need for guidance on these questions as noted by courts and commentators, or this Court's recognition of its unique responsibility to provide such guidance. For all these reasons, the Petition should be granted.

## I. THE BRIEF IN OPPOSITION DOES NOT MEANINGFULLY ADDRESS THE CIRCUIT SPLIT.

A. Despite ABC's suggestion to the contrary (Br. in Opp. 20), petitioners do not deny that *someone* must determine the central meaning or "gist" of an allegedly libelous broadcast. The question (on which the circuits are split) is whether this determination is for the jury alone, or whether appellate courts may re-examine it *de*

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the trial." *Id.* at 67a. At the same time, the Brief in Opposition for the most part ignores the evidence that caused the jury to conclude that the transactions were fair, that Mr. Levan believed them to be fair, and that ABC's own witnesses reached the same conclusion. *See* Pet. 8-11.

*novo*.[2] Most courts of appeals to consider the question have concluded that, where reasonable persons could disagree as to a publication's gist, the determination is one of fact and is therefore for the jury alone. *See* Pet. 19-24. The Eleventh Circuit disagreed, concluding instead that a reviewing court may redetermine the gist *de novo*. Although ABC attempts to show that no conflict exists by distinguishing the opinions of the other courts of appeals in a single footnote, its argument is unavailing.[3]

First, although ABC argued to the district court that *Lundell Manufacturing Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997), "run[s] directly counter to" Eleventh Circuit precedent, 34 R626-14 n.11, it now argues that *Lundell* is inapposite because the *Lundell* court did not "consider the standard of review for an actual malice determination." Br. in Opp. 19 n.12. But both the Eighth Circuit in *Lundell* and the Eleventh Circuit in this case did consider the standard of review *for a determination of the preliminary questions of gist and falsity*. ABC does not dispute that it asked both courts to apply independent review to *those* questions. And,

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[2] ABC relies (Br. in Opp. 20 n.13) on *Smith v. Cuban American National Foundation*, 731 So. 2d 702 (Fla. Dist. Ct. App. 1999) (per curiam), but the court there held that, "[i]f [as here] the statement is capable of more than one meaning, . . . *the trier of fact* should determine whether the language used was actually understood in its defamatory sense." *Id.* at 705 (emphasis added).

[3] ABC begins by asserting that the Eleventh Circuit's opinion contains no "holding" at all on the question petitioners raise; ABC argues that the court's lengthy discussion of the bounds of its review power, combined with its decision to conduct a *de novo* review of the gist of the broadcast, did not constitute a "holding." But the court plainly held that it was empowered to ascertain the gist as part of its "independent review," Pet. App. 18a n.29, and in fact did just that.

whereas the Eleventh Circuit expressly agreed to do so, the Eighth Circuit expressly refused to do so. The *Lundell* court based its holding on this Court's teachings in the actual malice case of *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), in which this Court plainly indicated that the task of determining a publication's meaning is for the jury alone. *See* Pet. 21.

ABC next attempts to minimize *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988), and *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998), in which the Third and Ninth Circuits held that, in public-figure cases, *juries* must determine the gist if reasonable persons could disagree on the issue. ABC argues that, because *Schiavone* and *Kaelin* were decided on summary judgment, the doctrine of independent review "was not implicated or addressed." Br. in Opp. 19 n.12. It would be pointless, however, for an appellate court to rule that an issue is for the jury and therefore may not be decided on summary judgment, but then, on a subsequent appeal of the same case after trial, to take that very issue *away* from the jury and make its own *de novo* determination. As confirmed by *Lundell* and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), ABC's theory cannot be taken seriously.[4]

Finally, ABC attempts to explain away *one* of the two Fifth Circuit cases squarely in conflict with the Elev-

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[4] ABC's argument also conflicts with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), another actual malice case. The Court there held that the deference given to the jury does not change as a case progresses: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

enth Circuit's decision. ABC altogether ignores the other, *Brown v. Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992), in which the Fifth Circuit limited independent review to "the ultimate finding of actual malice," and held that it was inappropriate to "conduct *de novo* review of the jury's determinations on preliminary factual issues *or* questions of credibility." *Id.* at 46 (emphasis added). As for *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556 (5th Cir. 1997), ABC does not deny that the Eleventh Circuit itself recognized a conflict with *Scalamandre* or that *Scalamandre* quoted *Brown*'s holding *verbatim*. ABC does suggest that *Scalamandre*'s analysis "was precisely the same as that conducted by the Eleventh Circuit here." Br. in Opp. 19 n.12. ABC is wrong. Although the Fifth Circuit did overturn a jury verdict, it did so *not* because it made its own determination of the gist, but because it concluded, applying a *traditional* standard of review, that no reasonable jury could accept the plaintiffs' version of the broadcast's implications (which the court termed "dubious," "unrealistic," and "illogical"). *See Scalamandre*, 113 F.3d at 562. In contrast, in this case the Eleventh Circuit engaged in a *de novo* review and never suggested that a reasonable jury could not accept petitioners' version of the gist.[5]

B. ABC also suggests that this case is unusual because the Eleventh Circuit believed that its determination of the gist was "intertwined with Levan's allegations of actual malice." ABC then goes on to argue that an appellate court may properly re-examine the gist in such a case as part of its independent review of the actual malice determination. Br. in Opp. 20, 22-23. But the Eleventh

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[5] On the facts of this case, the court plainly could not have reached such a conclusion: petitioners' view was embraced by ABC's own witness (Mr. Stossel), the magistrate, the district court, ABC's own lawyers, and, ultimately, the jury.

Circuit cited only a single case from its own circuit to support this "intertwining" theory—*Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993), a decision that ABC chooses not to embrace in its Brief in Opposition.[6] The absence of support outside the Eleventh Circuit is not surprising. Libel defendants inevitably argue that the central message of their publication was bland and general and that they never intended to convey the more toxic implications. Thus, the court's intertwining theory, if accepted, would abrogate the jury's role in nearly every libel case—a result that would nullify the Seventh Amendment's command that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Finally, ABC implies that petitioners' view of the law would be unworkable in that appellate courts would be forced to "search the trial record" to determine how the gist was articulated—"a strange task indeed," according to ABC. Br. in Opp. 24. But the Eleventh Circuit here had no trouble at all succinctly identifying the two competing gists the parties articulated before the jury:

> Appellants argue that the gist was merely that the rollups were unfair, which the broadcast demonstrated by juxtaposing the undervalued debentures that the limited partners received with Levan's financial success after the transactions were completed. Appellees, on the other hand, maintain that the gist of the broadcast was that Levan *knowingly* misled

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[6] The "intermingling" language ABC quotes (Br. in Opp. 22-23) from *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was plainly intended to justify independent review of the actual malice determination—not of every other issue in a defamation case. ABC does not dispute that the *Bose* Court made clear that independent review applies *only* to the question of actual malice. *See Bose*, 466 U.S. at 514 n.31; *see also* Pet. 19-20.

> the limited partners into accepting the rollup transaction, thereby benefitting himself, BFC and Bank-Atlantic. This implication, appellees argue, follows from ABC's "hiding" theme: because the broadcast presented Levan as refusing to speak with ABC on camera, ABC implied that he had something to hide.

Pet. App. 18a-19a.[7] Moreover, ABC's solution—that appellate courts may avoid the task of identifying competing versions of the gist simply by deciding the gist for themselves—is flatly inconsistent with the Seventh Amendment and this Court's precedents.[8]

## II. THE ELEVENTH CIRCUIT IGNORED THE INQUIRY THIS COURT PRESCRIBED IN *CONNAUGHTON*.

The Brief in Opposition altogether misses the point of petitioners' second question presented: that the Eleventh Circuit ignored the dictates of *Connaughton* and made no effort to identify the facts that the jury *must have found* to support a conclusion of actual malice. ABC has no response to petitioners' argument that, had the Eleventh Circuit identified two preliminary facts the jury must have found—first, that the core message of the broadcast was that Mr. Levan and BFC knowingly misled their investors; second, that (as Mr. Willson admitted) ABC knew *that* gist was false—actual malice would nec-

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[7] At page 19a of the Appendix to the Petition, a line of text from the Eleventh Circuit's opinion was inadvertently omitted. The sentence immediately following the call to footnote 31 should read as follows: ABC does not expressly say so, but this implication is apparent when viewing the report as a whole.

[8] In an afterthought, ABC argues that this case does not present an appropriate vehicle for certiorari because, according to the Eleventh Circuit, "the parties agree" that it is appropriate for an appellate court to determine the gist. As the Petition explained, however, petitioners never agreed to any such thing; on the contrary, they vigorously argued that determination of the gist was a jury question not subject to independent review. *See* Pet. 14-15 n.5.

essarily have been established. ABC instead argues that requiring deference to these preliminary facts would rob an appellate court of a "serious role . . . in determining whether actual malice has been proved by clear and convincing evidence," and would represent "an end run" around *Sullivan*. Br. in Opp. 27.

In fact, requiring appellate courts to identify (and defer to) such jury findings of preliminary facts is precisely the "role" prescribed in *Connaughton*, and that role is entirely consistent with *Sullivan*'s protection of free speech. Appellate courts must still determine (applying a traditional standard of review) whether the jury reasonably could have found these preliminary facts, and they must still conduct an independent examination to satisfy themselves that these facts, when combined with truly uncontroverted facts, meet the heightened standard of proof required by *Sullivan*. To say that this leaves too little for an appellate court to do in an actual malice case (*see id.*) amounts to nothing more than an attack on this Court's decision in *Connaughton*. It may be true that, as applied to this case, that standard leaves less to be done than ABC would like, but that is so only because ABC's witnesses *admitted* that they intended the broadcast to convey a more toxic gist—a core message they knew to be false.

ABC next argues that the "essence" of *Connaughton* requires appellate courts to defer only to "*credibility* determinations the jury must have made in resolving hotly disputed and conflicting testimony," and it implies that, in this case, there was no serious credibility dispute at trial. *Id.* at 26 (emphasis added).[9] In support of this

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[9] This view of the law is plainly inconsistent with the Fifth Circuit's post-*Connaughton* holdings in *Brown* and *Scalamandre*, where that court refused to extend independent review to "the

argument, ABC sets forth in detail the "mountain" of evidence it placed before the jury, summed up by Mr. Stossel's testimony that "everywhere we turned people said this was a bad deal." *Id.* at 14. ABC states that "[t]his critical testimony as to ABC's state of mind was totally uncontroverted by plaintiffs," *id.*, and parrots the Eleventh Circuit's similar conclusion in that court's attempt to distinguish *Connaughton, id.* at 28-29.

Even under this misguided reading of *Connaughton*, the Eleventh Circuit still erred. The jury unquestionably heard "hotly disputed and conflicting testimony" on credibility, which ultimately caused it to disbelieve the testimony of Messrs. Stossel and Willson. From their verdict, it is plain that the jurors instead chose to believe Messrs. Levan and Stearns, who testified that Mr. Willson told them repeatedly that, notwithstanding this "mountain" of evidence, he had serious doubts about the truth of his story and believed the truth to be "irrelevant." Pet. 9-11, 26-27.[10] Similarly, the jurors plainly rejected Mr. Stossel's claim that negative information was "everywhere we turned," in favor of evidence showing (among other things) that ABC purposely shunned investors who were "not angry enough." In conducting its actual malice inquiry under *Connaughton*, the Eleventh Circuit was obliged to accept these determinations.

At the end of the day, the jurors were forced to choose between the "avalanche" of paper that Messrs. Willson

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jury's determinations on preliminary factual issues *or* questions of credibility." *Brown*, 965 F.2d at 46 (emphasis added); *Scalamandre*, 113 F.3d at 560 (emphasis added).

[10] The jury's determination in this regard is not surprising, for even ABC did not put much stock in its "mountain." *None* of the sources discussed in the eight pages of the Brief in Opposition devoted to ABC's newsgathering activities (Br. in Opp. 7-14) was actually quoted in the broadcast.

and Stossel cobbled together for trial, and the testimony of live witnesses who looked them in the eye and swore that ABC's witnesses told them they did not believe in the basic truth of their story and did not care. Having seen none of the testimony, the Eleventh Circuit substituted its beliefs for those who had. *Connaughton* squarely prohibits the Eleventh Circuit's approach.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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